No. 89-474

IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM V. GRADY, DISTRICT ATTORNEY OF DUTCHESS COUNTY,

Petitioner,

vs.

THOMAS J. CORBIN,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

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Statement of the Case

At Pages 2 through 10 of the Petitioner's Brief, Petitioner sought to give a summary of the case beginning with the automobile collisions which ultimately resulted in death and physical injury and indicating the course of events which brought this matter before this court.

In the Respondent's brief, at Pages 2 through 7, he, too, sets forth a statement of facts. At Page 5, referring to J.A. 12, he states that the Assistant District Attorney, who was present on November 17, 1987, for Petitioner's sentencing on the Driving While Intoxicated and Failure to Keep Right charge recommended that the court impose the minimum sentence. The Petitioner does not believe that the local criminal court notes of the sentencing proceeding support that claim.

> 11/17/87 Thomas Corbin was present with his Attorney, Mark Reisman, before Judge Caplicki and ADA Heidi Sauter.
>
> Atty: My Client is willing to plead guilty and I request minimum sentence.
>
> Judge: Read charges. We will accept your plea of guilty. Any recommendation on sentence?
>
> Atty: Minimum sentence.
>
> Judge: The fine will be $350.00 and $10.00 surcharge. Your license will be revoked for six months and you will be given a twenty-day license. You can also attend the Article 21 School if you are eligible and must successfully complete the course.
>
> J.A.12

It appears from the court's notes that the recommendation of the minimum sentence was made by the defendant's attorney rather than the prosecutor.

ARGUMENT

Respondent's prosecution for manslaughter, criminally negligent homicide and assault should proceed

Respondent essentially concedes that the test derived from *Blockburger vs. United States,* 284 U.S. 299 (1932), would not bar his prosecution for manslaughter, criminally negligent homicide, and assault on Counts One, Four and Five of the Indictment, notwithstanding his guilty plea to Driving While Intoxicated and Failure to Keep Right. As we have explained, because the statutory elements of the two Vehicle and Traffic offenses include elements not included in the statutory definition of the crimes charged in Counts One, Four and Five, prosecution for these three counts would not be barred as prosecution for the "same offense" under *Blockburger. See* Brief for Petitioner at Pages 13-15. Nothing in Respondent's brief casts doubt on this conclusion.

Having conceded that the *Blockburger* analysis focuses on the statutory elements of the offense, and that the counts at issue here are not the "same offense" under *Blockburger,* as the traffic ticket offenses to which he pled guilty, Respondent advances three arguments. First, he argues that *Blockburger* is insufficient to determine whether two offense are the same for purposes of successive prosecutions, and that the *Blockburger* test should, therefore, be used only in multiple punishment cases. *See* Brief for Respondent at Pages 13-14. Second, he argues that dictum in *Illinois vs. Vitale,* 447 U.S. 410 (1980), should be taken to establish a new rule barring the use at a successive trial of evidence that the defendant was guilty of earlier offense to which he pled guilty. Brief for Respondent at Page 21. Third, he argues that some form of *res judicata* principle bars prosecution on the counts at issue in this case. Brief for Respondent at Pages 21-26. None of these arguments is persuasive.

Although Respondent would prefer that what has become as the *Blockburger* test be confined to the multiple punishment context, the test originated in a successive prosecution case, see *Morey v. Commonwealth*, 108 Mass. 433 (1871), and has been repeatedly applied in the successive prosecution context. See, *e.g., Illinois vs. Vitale*, 447 U.S. 410 (1980); *Brown v. Ohio*, 432 U.S. 161 (1977); *Gavieres v. United States*, 220 U.S. 338 (1911). The *Blockburger* test provides relatively determinate answers to the question of whether two offenses as defined by their statutory elements are "the same" for Constitutional purposes, and strikes an appropriate balance between the competing values of repose embodied in the double jeopardy clause and society's need to prosecute those who violate the criminal law.

Illinois v. Vitale, 447 U.S. 410 (1980), should not be read to have created an additional hurdle—over and above the *Blockburger* test—that must be overcome before prosecuting a defendant for a crime where the evidence of such crime is related to evidence used in a preceding prosecution. The language from *Vitale* upon which the Respondent relies was plainly dictum; although, suggesting that the use of the same evidence in the second prosecution would create a "substantial" double jeopardy claim, (447 U.S. at 420-21), this Court did not rule that the second prosecution would in fact violate the double jeopardy clause.

To hold that this Court in a few sentences at the conclusion of the *Vitale* opinion intended to create a far reaching extension of the Constitutional bar to re-prosecution would render inexplicable the balance of the *Vitale* opinion, as well as other cases in which this court has addressed the same issue. As the *Vitale* Court noted:

> The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the *Blockburger* test. The mere possibility that the state will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.

447 U.S. at 419. See, *e.g., Brown v. Ohio, supra*, 432 U.S. at 166, ("The test to be applied is whether *each provision* requires proof of a fact which the other does not.") (emphasis added), *Ianelli v. United States*, 420 U.S. 770, 785 n.17 (1975) ("If each [statute] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, not withstanding a substantial overlap in the proof offered to establish the crimes."). This court's emphasis in *Vitale* and elsewhere on the statutory elements of the crime would have been futile if the critical inquiry involved the actual evidence which the state intended to—or actually did—introduce at the second trial. Indeed, the adoption of this "actual evidence" test would render further use of *Blockburger*, in the successive prosecution context, superfluous. Under that standard, every prosecution that would be barred under *Blockburger* would be presumably barred by this "actual evidence" test.

In addition, adopting Respondent's test would substantially complicate double jeopardy analysis of successive prosecution cases. In many cases, it would not be possible until after the second trial was completed to determine the extent to which the evidence at the two trials overlapped. Thus, the question as to whether the second trial was barred would often have to be postponed until after the second trial was concluded. This would cause a particularly inapt result in applying a right which is intended to protect the defendant against burdens of undergoing a second trial. *See Abney v. United States*, 431 U.S. 651 (1977). Nowhere does Respondent explain the scope of the bar that would be created by his test. Would it extend to any evidence that was

in fact introduced at both trials? Would it extend to evidence that, although perhaps circumstantial, turned out to be essential to prove the state's case at both trials? Would it extend to evidence that was direct evidence of an element of the second prosecution, but was merely cumulative as to that element? How would it be determined precisely what evidence was precluded by a guilty plea, rather than a trial, on the first charge. To adopt the Respondent's position would unnecessarily create a fruitful spawning ground for future litigation.

Respondent's suggestion that principles of *res judicata* or claim preclusion would bar his prosecution is another manifestation of Respondent's argument that the Court should adopt a "same transaction" test to determine the applicability of the double jeopardy clause in successive prosecution cases. *See* Brief for Respondent at Pages 21-26. Section 24 of the Restatement (Second) Of Judgments on which Respondent relies expressly would extinguish "all rights of [the state] to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions out of which the action arose." (Emphasis added.) *See* Brief for Respondent at Pages 22-23. Although this test is commonly used in civil cases and has repeatedly been advanced by Justice Brennan in a number of contexts (*see, e.g., Ash v. Swenson*, 397 U.S. 436, 453-54 [1970]) (Brennan, J. , concurring), the court has repeatedly rejected the suggestion that it is constitutionally mandated by the double jeopardy clause in criminal cases. *See Garrett v. United States*, 471 U.S. 773, 790 (1985). Respondent advances no hitherto ignored reason why the court should now revisit this issue.

Respondent urges that the problem in this case was caused by prosecutorial error. Brief for Respondent at Pages 24-26. We believe and argued vigorously, although unsuccessfully (*see* Pet. App. 7a-9a), to the contrary, that the bar to further prosecution in this case arose because

Respondent actively took advantage of the system to mislead the local criminal court judge into accepting his guilty plea, thus creating the double jeopardy problem. Regardless of what may have occurred in the town court in this case, the rule of law which Petitioner advocates in no way depends on a conclusion that the prosecutor erred—or that the defendant did not.

The bar to further prosecution advocated by Petitioner would arise in future cases of this kind, regardless of whether the prosecution could have prevented the defendant from pleading guilty. For example, under New York Law, where a defendant is charged with a Vehicle and Traffic violation, he or she may plead guilty to a traffic violation by simply completing the declaration on the reverse side of the traffic ticket and mailing it to the court with his motor vehicle record of conviction. (New York Criminal Procedure Law Section 170.10, Subdivision 1[a]; New York Vehicle and Traffic Law Section 1805.) In such case, the existence of the traffic ticket may never be known to the prosecutor. However, if the conduct for which the defendant received the traffic ticket was criminally negligence, or reckless, and, in fact, caused death or serious injury, the defendant who took advantage of this technique would apparently, under Respondent's construction of the double jeopardy clause, be able to insulate himself from all further criminal liability. This result would conflict with the principle that the double jeopardy clause does not exist to provide an unjustified windfall. *Jones v. Thomas*, U.S. , 109 S.Ct. 2522, 105 L.Ed.2d 322, 355 (1989).

It is our position that two offenses are not "the same" for purposes of the double jeopardy clause if under the *Blockburger* test the statutory elements of each are not necessarily included within the elements of the other. See Brief for Petitioner at 19 and n.5. This court has never applied a "same evidence" test to bar a second trial on the grounds of

double jeopardy. To craft a new judicial rule instituting such test would invite endless litigation concerning the relationship between two prosecutions, the facts that would be necessary to prove them and the facts that the prosecution actually chose to adduce at trial. Since the Respondent has failed to advance any substantial reason why such rule of law is required, Respondent's arguments should be rejected.

Conclusion

The decision of the New York State Court of Appeals in the case at bar is an erroneous application of the Fifth Amendment Double Jeopardy Clause. The New York State Court of Appeals expansive ruling grants the Respondent enhanced protection which is not warranted by this Court's previous rulings and Respondent's prosecution for Manslaughter, Criminally Negligent Homicide and Assault should proceed.

For all the foregoing reasons, we ask this Court to reverse the decision of the New York State Court of Appeals and remand the case for further appropriate proceedings.

Respectfully submitted,

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